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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-934

Filed 2 April 2024

Cumberland County, No. 20 JT 390

IN THE MATTER OF: M.M.D.

Appeal by respondent-father from order entered 12 June 2023 by Judge Toni S. King in Cumberland County District Court. Heard in the Court of Appeals 18 March 2024.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, for petitioner-appellee mother.

Sydney Batch for respondent-appellant father.

PER CURIAM.

In this private termination of parental rights action, respondent-father seeks review of an order terminating his parental rights to his minor child, Mary.¹ Respondent-father's failure to timely file his notice as provided by rule and statute requires that we dismiss his appeal.

I. Factual Background and Procedural History

¹ The stipulated pseudonym for the child.

Petitioner and respondent-father are Mary's biological mother and father, respectively. Mary was born in Morgantown, West Virginia in August 2014, and although they were never married, petitioner and respondent-father lived together briefly with Mary following her birth. Petitioner found the situation unsustainable, however, because respondent-father was not assisting her financially or with childcare, and so petitioner and Mary moved in with petitioner's parents. For about a year, petitioner regularly facilitated visits between Mary and respondent-father, but when petitioner's parents subsequently moved to Charleston, West Virginia in 2015, petitioner and Mary relocated with them. Petitioner nevertheless continued to drive Mary several hours from Charleston to Morgantown on weekends for visits with respondent-father as petitioner's work schedule permitted.

Petitioner married an active service member in 2016, and soon thereafter, her husband was transferred to a base near Fayetteville, North Carolina. As a result, petitioner and respondent-father entered into a private agreement regarding Mary which, *inter alia*, permitted respondent-father regular visitation. After petitioner's move with her husband and Mary to North Carolina and through the date of the termination hearing on 5 April 2023, however, respondent-father did not visit Mary, speak to her by telephone or other means, or communicate directly with his daughter in any way. From at least 2016, respondent-father never provided any financial, emotional, or other support to Mary; indeed, at the time of the termination hearing, Mary was apparently unaware of respondent-father's name, much less his biological

relation to her, and according to a report of the guardian ad litem, Mary at that time believed that her stepfather, petitioner's husband, was her only father.

The transcript indicates that petitioner filed an earlier petition to terminate respondent-father's parental rights at some point in 2020² but that petition appears to have been either denied or dismissed. In July 2021, petitioner, her husband, and respondent-father, who were all apparently present in Fayetteville for a hearing on the 2020 petition, discussed the sensitivity of Mary discovering the existence of respondent-father as her biological father and how best to "integrate him back into [Mary's] life." Together they formed a plan for respondent-father to return to Fayetteville the following week, but respondent-father did not return to Fayetteville as planned or follow up about developing a relationship with Mary at that time, although respondent-father did drive through North Carolina later that month en route to a vacation in Florida.

On 26 May 2022, petitioner filed a petition to terminate respondent-father's parental rights to Mary in this case file, alleging as a ground for termination neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). Although respondent-father was in North Carolina for a court date in this proceeding in December 2022, at which time respondent-father's counsel directed him to schedule a visit with Mary, no visit took

² While the transcript of the termination hearing includes passing references to the earlier petition, neither the earlier petition nor any documents pertinent to that proceeding appear in the record before the Court in this appeal.

place. Respondent-father also sought and received approval from petitioner to send Mary a gift in December 2022, but he failed to follow through by sending a gift at that time.

The termination of parental rights petition was heard in the District Court, Cumberland County on 5 April 2023, at which proceeding all parties were present and represented by counsel. In the resulting order terminating respondent-father's parental rights, the district court found as fact that: Mary had been in petitioner's care and custody since birth; respondent-father had not visited Mary or spoken to her since 2016; at all times during Mary's life, respondent-father knew petitioner's telephone number and address; petitioner and respondent-father had discussed a plan for respondent-father's visitation with Mary in July 2021 but despite travelling through North Carolina for vacation in July 2021 and being in Fayetteville for a court hearing in December 2022, respondent-father never arranged to visit Mary; and respondent-father provided no financial or other support to Mary and had no involvement in her life after 2016. As a result, the district court determined that respondent-father had "demonstrated a well settled intent not to be an active part of [Mary's] life," "willfully abandoned" Mary, and "acted in a manner inconsistent with his constitutionally protected status as" Mary's parent. The court then concluded that grounds existed to terminate respondent-father's parental rights to Mary pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) because Mary "did not receive proper care, supervision or discipline from" respondent-father and respondent-father abandoned

Mary. The district court further determined that termination of respondent-father's parental rights was in Mary's best interest.

II. Appellate Jurisdiction

Respondent-father acknowledges that the termination of parental rights order from which he purports to appeal was filed on 12 June 2023, and he represents in his brief that he "timely filed his notice of appeal on 18 July 2023."³ The record in this matter, however, while confirming that the termination order was filed on 12 June 2023, reveals that the order was served on respondent-father on 14 June 2023. A party must file and serve a written notice of appeal within 30 days after entry and service of an order terminating parental rights. *See* N.C.R. App. P. 3.1(b) (citing N.C. Gen. Stat. § 7B-1001(b) (2023)). The thirtieth day following service of the termination order on respondent-father in this matter was Friday, 14 July 2023, but respondent-father did not file and serve his notice of appeal until Tuesday, 18 July 2023,⁴ thirty-four days later and thus four days outside the timeframe established by statute and rule. His notice of appeal being untimely, respondent-father's appeal must be dismissed. *See In re J.C.B.*, 233 N.C. App. 641, 645, 757 S.E.2d 487, 490 ("An

³ We note that respondent-father's notice of appeal was filed on his behalf by his trial counsel, with respondent-father's appellate counsel being appointed on 10 August 2023.

⁴ The notice of appeal bears two file stamps: one for 18 July 2023 and one for 19 July 2023, the latter time stamp bearing a handwritten notation of "corrected order." No party explains this discrepancy, but we observe that the notice of appeal includes several handwritten strikes and writings as to the date of the termination order's rendering and filing. In any event, the notice of appeal was apparently served on all parties on 18 July 2023, and nothing in this decision would be altered regardless of whether the notice was filed on the 18th or 19th day of July 2023; it was untimely on both dates.

appellant’s failure to give timely notice of appeal is jurisdictional, and an untimely attempt to appeal must be dismissed.”) (citation and internal quotation marks omitted), *disc. review denied*, 367 N.C. 524, 762 S.E.2d 213 (2014).

Our Appellate Rules provide this Court the discretion to issue a writ of certiorari “in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals[.]” N.C.R. App. P. 21. *See also In re K.P.*, 249 N.C. App. 620, 623, 790 S.E.2d 744, 747 (2016). Respondent-father has not requested that this Court allow review under Appellate Rule 21, either in his appellate brief or by the filing of a separate petition for writ of certiorari, even though petitioner raised the issue of the untimely notice of appeal in her appellee brief and has asked this Court to dismiss respondent-father’s appeal on that basis. While this Court *may* issue the writ *ex mero motu*, *see In re I.S.*, 170 N.C. App. 78, 84–85, 611 S.E.2d 467, 471 (2005), we decline to do so here for the reasons discussed below.

In deciding whether to reach the merits of respondent-father’s arguments by means of certiorari review, we find helpful guidance in *In re I.S.*, where the Court elected to issue the writ *ex mero motu* to permit review where a notice of appeal was timely but included “a mere scrivener’s error” as to the date of the order appealed from, “[i]n light of the serious consequences of the termination of parental rights, the lack of objection to this error by appellees and the fact that the order referenced in the notice of appeal was clearly an error.” 170 N.C. App. 78, 84–85, 611 S.E.2d 467,

471 (2005). Moreover, the Court found merit in that appellant's position and therefore reversed the order terminating his parental rights. *Id.* at 89, 611 S.E.2d at 474.

Here, the only apparent similarity to *In re I.S.* is the admittedly "serious consequence[]" of the termination of respondent-father's parental rights. *See id.* at 84, 611 S.E.2d at 471. In contrast, however, the jurisdictional flaw in the notice of appeal in the case at bar was no "mere scrivener's error," *id.*; petitioner here has explicitly objected to our review by issuance of a writ of certiorari; and respondent-father's appellate arguments appear to lack merit. Further, even upon respondent-father's attention being drawn to the deficiency of his notice of appeal, he has not requested our issuance of the writ with the result that this Court is left to consider exercising its discretion to issue a writ of certiorari where respondent-father has not bothered to ask that we do so.⁵

III. Conclusion

This purported appeal is dismissed.

DISMISSED.

⁵ In electing not to issue a writ of certiorari *ex mero motu*, we emphasize the following: Both parties here were represented by counsel at the termination hearing. Respondent-father's trial counsel and the district court reiterated at the termination hearing in respondent-father's presence that although respondent-father expressed a desire to give oral notice of appeal, he must do so in writing. As to the merits of respondent-father's appellate contentions, namely that he did not neglect Mary by abandonment, we emphasize the undisputed evidence that respondent-father had no direct involvement with his child for six to seven years of her life, and despite the longstanding openness of petitioner to respondent-father developing a relationship with Mary, respondent-father avoided every such opportunity to the extent that Mary was unaware at the time of the termination hearing that respondent-father was her biological father. In this context, we decline to exercise our discretion to issue a writ of certiorari *ex mero motu* to review the merits of respondent-father's arguments.

IN RE: M.M.D.

Opinion of the Court

Panel consisting of:

Judges ZACHARY, CARPENTER, and THOMPSON.

Report per Rule 30(e).